



IRCP

Institute for International Research on Criminal Policy
Ghent University

Prof. Dr. G. Vermeulen – Mutual Recognition in Practice: Sanctions – Trier, 29 July 2010

Mutual Recognition in Practice: Sanctions

Prof. Dr. Gert Vermeulen

Summer Course on European Criminal Justice
ERA – Trier, 29 June 2010



Structure

- › systematic overview and assessment
 - › antecedents, novelties and problems
- › according to sanction type, distinguishing between
 - › financial penalties
 - › confiscations
 - › custodial sentences
 - › including pre-trial detention and alternatives
 - › disqualifications (below)
- › criminal records
 - › taking into account of previous convictions
 - › linking in with MLA, MR of disqualifications



FD on financial penalties (1)

- > antecedents
 - > 1970 CoE Convention Int'l Validity Criminal Judgements
- > scope
 - > a sum of money on conviction for an offence (fine)
 - > compensation imposed in the same decision for the benefit of victims, where the victim may not be a civil party to the proceedings
 - > a sum of money in respect of the costs of court or administrative proceedings leading to the decision
 - > a sum of money to a public fund or a victim support organisation, imposed in the same decision



FD on financial penalties (2)

- > 6 more offences added to traditional 32 MR list
 - > conduct which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods
 - > smuggling of goods
 - > infringements of intellectual property rights
 - > threats and acts of violence against persons, including violence during sport events
 - > criminal damage
 - > theft



Confiscation crime proceeds

- > traditional conventions/treaties
- > FD confiscation 24 February 2005
 - > confiscation crime-related proceeds, instrumentalities and property
 - > approximation domestic law MS
 - > major novelties: extended confiscation (reasonable suspicious period; property from similar offences; reversal burden of proof) + net-widening)
- > FD “European Confiscation Order”
 - > mutual recognition-based
 - > add-on to European Freezing Order
 - > like it is the case with the EEW in the context of MLA
 - > recognition confiscation corporate property
 - > grounds for refusal essentially for ‘extended’ confiscation
 - > introduction mandatory asset sharing mechanism



Pre-trial detention and & alternatives

- > 2002 FD on the EAW and the surrender of persons
- > 2009 FD on supervision order
 - > goal good but lack of clarity about scenario's (one or two)
 - > 1st: person concerned in forum state
 - > transfer to home state unregulated
 - > back transfer through EAW guaranteed
 - > even for offences to which EAW does not apply
 - > 2nd: person already in home state
 - > no explicit mention of scenario
 - > whereas chief alternative to disproportionate use EAW
- > assessment: MR improves previous situation
 - > no solid arguments for MR flanking measures

Custodial sentences and & alternatives

- › 2002 FD on the EAW and the surrender of persons
- › 2008 FD on MR custodial sentences & depriv. of liberty
 - › revisiting EAW for *aut dedere aut exequi* scenario
 - › + new autonomous transfer of prisoner mechanism
 - › buzzwords (official rationale)
 - › social rehabilitation and succesful reintegration
 - › however position prisoner/executing MS radically changed
 - › antecedents:
 - › 1983 CoE transfer of prisoner Convention + 1997 Protocol
 - › humanitarian (1983) + escape/expulsion scenarios (1997)
 - › assessment: MR creates new problems (infra)
- › 2008 FD on probation orders & alternative sanction
 - › antecedents: 1964 CoE convention – assessment: good



2008 FD custodial sentences – problems (1)

- > as for pre-trial detention, be it even more relevant
 - > differences in material conditions, health care, disciplinary regime, etc
- > executing MS can adapt, refuse to recognise or enforce a sentence if containing aspects which cannot be executed in accordance with legal system – Articles 8.2/8.3 & 9.1 (k)
 - > incompatibilities concerning duration and nature
 - > adaption according to sanction for similar offences
 - > difficult in case of lack of dual criminality
 - > should no result in aggravation
 - > = no standard *lex mitior* rule
 - > considerable discretion - lack of agreed standard scale
 - > psychiatric/health care measure



2008 FD custodial sentences – problems (2)

- > law executing MS applies to execution of sentence
 - > possible withdrawal certificate if law on early or conditional release unsatisfactory to issuing MS
 - > various problems with enforcement modalities
 - > electronic monitoring
 - > autonomous sanction or mere modality?
 - > house or weekend arrest
 - > etc
- > free movement of persons? discrimination on basis nationality?
- > position of the victim?
- > IRCP study on detention in the EU 27 as lead-up to EC initiative
 - > announced in Commission Action Plan Stockholm Programme



Criminal records

- > acquis (pre-Amsterdam)
- > current EU initiatives
 - > context
 - > overview – state of affairs
 - > questions and challenges
 - > towards a generic EU data structure?
 - > further potential
- > questions & discussion



Acquis (pre-A'dam)

- > CoE treaties, chiefly
 - > 1959 MLA (Articles 13 & 22)
 - > 1960ies Road Traffic
 - > 1970 Int'l Validity Criminal Judgements
 - > =MR *avant-la-lettre*
- > unsuccessful EPC-Convention 1991
- > Schengen (road traffic)
- > EU (Maastricht): 1996 driving licenses
- > ...



Context EU initiatives (1)

- > Mutual Recognition (MR) Plan November 2000
 - > individualisation of sanctioning
 - > take account of previous EU convictions in sentencing for newly committed offences
 - > already introduced for EUR fraud/counterfeiting
 - > give effect to disqualifications in MS of residence (e.g. driving license withdrawal) or all MS (e.g. working with children)
 - > mutual recognition of decisions to prosecute
 - > link with avoiding 'double prosecution' (extended ne bis)
 - > feasibility study requested re EU criminal records system and register of disqualifications
 - > IRCP-initiated; co-financed by EC (Grotius)
 - > Vermeulen et al (2002), Blueprint for an EU criminal records database



Context EU initiatives (2)

- > Fourniret case 2004 (B-F)
 - > what? challenge (real, perceived)
 - > recalling Dutroux case 1996 (B), having triggered studies (IRCP) & policy initiatives re EU data collection sexual offences against children
- > initiative European Commission
 - > White Paper 2005 (+ annex)
 - > building strongly on proposals Vermeulen et al
 - > searchable central index system
 - > detailed (folio) info remains in individual MSs
- > JHA Council April 2005: political 'dual track' scenario
 - > convictions against EU citizens
 - > centralisation in MS of nationality
 - > triggered by 'interconnection' pilot network (B-F-D-E) (expanded)
 - > convictions against 3rd country nationals
 - > central index system after all? see: COM (2006) 359 working doc



Overview – State of affairs

- > Decision November 2005 (to be abrogated from by)
- > 2009 FD organisation & content
 - > centralisation info in MS of nationality
 - > “develop standardised European format allowing criminal records info exchange in a uniform, electronic & easily machine-translatable way”
 - > Unisys & IRCP - has lead to ECRIS 2009 (and classification)
 - > improve application CoE 1959 MLA Convention
 - > render Article 22 (more) performant
 - > especially relevant for ministries/central authorities
 - > facilitate/accelerate crimrec-related MLA requests Article 13
 - > especially relevant for decentral, competent authorities
- > 2008 FD on taking account of earlier EU convictions
 - > addresses decentral, competent judicial authorities
- > working doc on feasibility index system 3rd country nationals (supra)

Questions and challenges

- > involvement end users?
 - > judicial authorities: courts/judges, investigating judges, prosecutors
 - > police authorities? (national, Europol; explanation)
- > (preliminary) investigation
 - > current proposals: minimal investigative relevance (only searchable on name/id-related fields, in case of known EU nationality)
 - > Fourniret case at least triggered change in Belgium (not a EU level)
- > establishing 'ne bis in idem' situation
- > sentencing
 - > taxation/assessment of foreign sentence/sanction: how?
 - > current proposals: bring no EU-wide equivalence of criminal justice concepts/jargon
 - > ideal system: double qualification (extra work)
- > what about disqualifications?
 - > no more negative impact than in sentencing MS (courts/judges' role?)
 - > integration Belgian proposal (children): not really happened so far ...



Towards a generic EU data structure?

- > EU criminal justice Esperanto” (single EU interface)
- > i.e. new standardized logic, with
 - > offender-related fields
 - > offence-related fields
 - > encompassing EAW categories, pilot network families and classifications Europol IS & Eurojust CMS, etc
 - > idea of EU classification of offences officially supported
 - > DG JLS/D3 (criminal records) + Unisys/IRCP (crime statistics)
 - > EULOCS (enhancing internal coherence EU criminal policy)
 - > decision-related fields
 - > sanction/measure-related fields
- > additional benefits
 - > making most of info machine-translatable
 - > providing end-user useful interpretative info (where available)

Further potential

- > use common format (generic structure?) also for
 - > direct exchange under Article 13 1959 Convention
 - > EU-index system MS' info on 3rd country nationals
- > maximize investigative/prosecutorial value criminal records infoex system
 - > make offence-/other fields searchable
 - > via MLA requests or based on PoA
 - > link in with Europol information system
 - > allow Eurojust access (CMS) (ne bis in idem)
- > role Eurojust in hosting index-system
 - > for 3rd states' access?
- > additional EU legislation based on MR concept
 - > regarding legal effect inclusion following notification (see:B)
 - > limited introduction EU-certificates non-prior conviction



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